85-352

No. _____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NORTH AMERICAN REPORTING, INC.

and

RICHARD LEE BOYD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err by ruling, in conflict with the law in other circuits, that a trial judge has broad, virtually unreviewable discretion to exclude evidence under Rule 403, Fed. R. Evid.?

2. Did the Court of Appeals err by ruling, in conflict with the law in other circuits, that courts could determine the credibility of evidence in applying Rule 403?

3. What are the appropriate standards courts should apply when considering the application of Rule 403 to evidence offered by a defendant in a criminal case when that evidence is exculpatory?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court lists all parties to the proceeding.

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IN THE

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OCTOBER TERM, 1985

No. ————

NORTH AMERICAN REPORTING, INC.

and

RICHARD LEE BOYD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners North American Reporting, Inc. and Richard Lee Boyd respectfully request that a writ of certiorari be issued to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The rulings of the District Court of the District of Columbia that form the basis of petitioners' claims of error were made during the course of the trial. The trial court issued no opinion in this case, but relevant portions of the transcript of that trial are set forth in the Appendix to this petition at C.

The opinion of the District of Columbia Court of Appeals is reported at 740 F.2d 50 (D.C. Cir. 1984) and is included in the Appendix at B. The Order of the Court of Appeals denying rehearing and rehearing en

banc sought by petitioners is set forth in the Appendix at A.

GROUNDS OF JURISDICTION

The District of Columbia Court of Appeals affirmed the convictions of petitioners, North American Reporting, Inc. and Richard Lee Boyd, on eight counts of mail fraud, in violation of 18 U.S.C. § 1341, and eight counts of making false statements, in violation of 18 U.S.C. § 1001, on May 3, 1985. The District of Columbia Court of Appeals denied the petitioners' timely petition for rehearing and rehearing en banc on July 2, 1985. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves Rule 403 of the Federal Rules of Evidence. Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

On February 2, 1983, the grand jury returned a sixteen count indictment against Richard Lee Boyd and North American Reporting Company, Inc., the petitioners, for mail fraud and making false statements.

The jurisdiction of the United States District Court for the District of Columbia was invoked under 18 U.S.C. § 3231 in connection with mail fraud, in violation of 18 U.S.C. § 1341, and making false statements, in violation of 18 U.S.C. § 1001. On October 2, 1984, the trial court on remand reaffirmed the jury's finding of guilty on all sixteen counts of the original indictment.

The trial judge's exclusion of exculpatory evidence under Rule 403 of the Federal Rules of Evidence is the basis for this petition. This case arose out of a contract

between petitioners and the government for court reporting services. Petitioners were to be paid based on the number of hours that their employees worked. Petitioners submitted to the government monthly vouchers setting forth their employees' hours. The crucial evidence in support of the government's case was presented through an FBI agent who testified as a summary witness. He testified that he had compared the vouchers with time records kept by the employees. He then testified, in detail, about 193 instances in which there were discrepancies which resulted in "*over*billings." He testified that there were only 18 discrepancies which resulted in "*under*billings," and the government argued that this disparity indicated that the overbillings must have been deliberate. Finally, the government introduced a chart which set out each instance in which they claimed there was an overbilling (Trial Transcript ("Tr.") 562-574).

Petitioners claimed that there was no intentional overbilling. The government's claims of overbillings were explained by differences in contract interpretation and innocent mistakes. To counter the government's claim that *over*billings greatly exceeded *under*billings and therefore could not have been innocent, petitioners sought to prove that there were numerous instances in which they had failed to bill all the hours which they could have. Petitioners sought to have petitioner Boyd explain specific instances when petitioners had underbilled and prepared as an exhibit a chart, following the same format as the one which the government had introduced into evidence, setting out these underbillings. The trial judge excluded this evidence. While she allowed Boyd to testify in a general fashion about the categories of underbillings, she refused to permit him to explain in detail the underbillings. She further refused to permit him to testify as to the amount of the underbillings. Finally, she refused to admit the defense chart. Relying on Rule 403, Fed. R. Evid., the explanation she gave for

these rulings was that the evidence was "confusing" (Appendix C; Tr. 990-1017).

The petitioners filed an appeal before the District of Columbia Court of Appeals. The Court of Appeals affirmed the proceedings and convictions. The Court of Appeals remanded the case to the District Court to make findings with respect to another issue raised on appeal but not raised in this petition. The District Court reaffirmed petitioners' convictions, and the Court of Appeals affirmed. *United States* v. *North American Reporting, Inc.*, 761 F.2d 735 (D.C. Cir. 1985). The petition for rehearing, which had been held in abeyance pending the outcome of remand, followed. The Court of Appeals denied petitioners' timely petition for rehearing and rehearing *en banc* on July 3, 1985.

REASONS FOR GRANTING THE PETITION

A. Introduction

The Court of Appeals decision affirming the trial judge's exclusion of exculpatory evidence deviates from the law established in other circuits in two respects: first, it gives to the trial judge virtually unreviewable discretion to exclude relevant evidence under Rule 403, Fed. R. Evid. Other circuits have construed Rule 403 as an extraordinary remedy permitting exclusion of relevant evidence only in limited and unusual circumstances. The D.C. Circuit's ruling allows trial judges discretion to exclude evidence beyond the narrow parameters intended by Rule 403, making future appellate review of Rule 403 exclusions nothing more than a blind stamp of approval. Second, the decision justifies the exclusion of relevant evidence under Rule 403 on the ground that it lacked credibility, whereas other circuits have held that Rule 403 does not allow a judge to usurp the jury's function by excluding evidence because the judge does not find it to be credible.

The D.C. Circuit opinion not only differs with the law in other circuits, but it also presents a unique, separate issue which the Court of Appeals ignored and which petitioners believe no court has previously addressed: what is the effect on the standards to be followed in considering the exclusion of relevant evidence under Rule 403 when the evidence is offered for the purpose of and tends to prove the innocence of a defendant in a criminal case? Most criminal cases which have given rise to appellate opinions interpreting Rule 403 have been cases in which the evidence was proffered by the prosecution and admitted by the judge despite defense claims that it confused the issues or was unduly prejudicial. In that context some appellate courts have set forth the standards which trial judges are to follow—standards which differ from those applied by the D.C. Circuit in this case. But the question of what standards are to be followed when the proffered evidence is exculpatory has never been addressed, and the D.C. Circuit's opinion in this case did not acknowledge the possibility that a judge's discretion to exclude relevant evidence was even affected by the fact that the evidence was exculpatory.

This case, then, offers this Court the opportunity to establish a single approach to the application of Rule 403 for appellate courts and trial judges to follow. It also offers the opportunity for this Court to consider under what circumstances, if any, it is appropriate for a criminal justice system, based on the principles that all men are innocent until proven guilty and that guilt must be proven beyond a reasonable doubt, to exclude relevant, exculpatory evidence.

B. The D.C. Circuit's Standardless Approach to Rule 403 Conflicts with the Law in Other Circuits

Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the

> danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

It is important at the outset to note two things about this rule. First, the rule deals with the exclusion of *relevant* evidence only. If a judge finds that evidence is irrelevant, the evidence is excluded on that ground alone, and there is not occasion to apply Rule 403. The second thing to be noted is that relevant evidence *may* be excluded under Rule 403, but only if its probative value is *substantially* outweighed by one of the competing factors. These two points are important to have in mind when analyzing the D.C. Circuit's opinion.

The D.C. Circuit affirmed the trial judge's exclusion of relevant, exculpatory evidence, holding that the judge "acted well within her discretion." 740 F.2d at 51. The court's legal analysis of the standards for applying Rule 403 was that the "decision to exclude relevant evidence pursuant to Rule 403 is committed to the sound discretion of the trial judge." *Id.* at 53. The court concluded that the judge's discretion had not been abused.

This simplistic approach grants unbridled and virtually unreviewable discretion to the trial judge. It sets no standards as to how other courts—trial or appellate—are to approach Rule 403 issues in the future. And it is fundamentally inconsistent with the more measured and sophisticated approach of courts in other circuits.

Other circuits have recognized that a court's authority to deprive a jury of relevant evidence must be limited. The Sixth Circuit has emphasized that the evidence must be evaluated "in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *United States* v. *Brady*, 595 F.2d 359, 361

(6th Cir.), *cert. denied*, 444 U.S. 862 (1979).[1] The D.C. Circuit's approach, that the application of Rule 403 is discretionary with the trial judge, conflicts directly with the law in other circuits and with the approach advocated by almost all authorities.

Once there is a determination that proffered evidence is relevant—a factor which has never been in dispute here[2]—the question becomes whether the probative value of the evidence is "substantially outweighed" by one of the competing considerations enumerated in Rule 403.

In this determination, the trial judge must balance the competing interests—probative value vs. confusion of the issues—and decide whether the latter "substantially" outweighs the former. Until that balance has been struck, the court has no discretion to exclude the evidence.

> The rule requires the judge to go through a conscious process of balancing the costs of the evidence against its benefits. Unless the judge concludes that the probative worth of the evidence is "substantially outweighed" by one or more of the countervailing factors, there is no discretion to exclude; the evidence must be admitted.[3]

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[1] *Accord, United States* v. *Zipkin*, 799 F.2d 384 (6th Cir. 1984); *United States* v. *Hans*, 684 F.2d 343 (6th Cir. 1982); *United States* v. *Green*, 548 F.2d 1261 (6th Cir. 1977); *United States* v. *Dennis*, 625 F.2d 782, 797 (8th Cir. 1980); *Abernathy* v. *United States*, 402 F.2d 582 (8th Cir. 1968). *See* J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 403[03] (1977).

[2] The critical issue at trial was the intent of petitioners. Evidence showing that "overbillings" were offset by "underbillings" would tend to prove that the "overbillings" like the "underbillings" were inadvertent. *See United States* v. *Sternstein*, 596 F.2d 528 (2d Cir. 1979); *United States* v. *Bitter*, 374 F.2d 744 (7th Cir.), *rev'd. on other grounds*, 389 U.S. 15 (1967); *Cf. United States* v. *Dennis*, 183 F.2d 201, 232-33 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951) (Hand, J.).

[3] 22 C. Wright & K. Graham, *Federal Practice and Procedure* 263 (1978).

In striking this balance, the court's finding must be made in light of the underlying principle of the Federal Rules of Evidence which favors the admissibility of relevant evidence.[4] The Tenth Circuit has noted that "Federal Rules and Practices favor the admission of evidence, rather than its exclusion if the proffered evidence has any value at all." [5] The Fifth Circuit has stated that "because it permits a trial court to exclude concededly probative evidence, Rule 403 is an extraordinary remedy which should be used sparingly." [6] The Rule's major function is "limited to excluding matter of scant or cumulative probative force . . . ." [7]

It is for this reason that Rule 403 requires that relevant evidence be admitted unless its probative value is "substantially outweighed" by its confusing aspects.

> The phrasing of Rule 403 makes it clear that the discretion to exclude does not arise when the balance between the probative worth and the countervailing factors is debatable; there must be a significant tipping of the scales against the evidentiary worth of

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[4] Rule 402, Fed. R. Evid., provides:

> All relevant evidence is admissible except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

[5] *United States* v. *Guerrero*, 667 F.2d 862, 867 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982).

[6] *United States* v. *Thevis*, 665 F.2d 616, 633 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982). For examples of how the presumption in favor of admissibility results in the admission of evidence despite clear prejudicial aspects see *United States* v. *Booth*, 669 F.2d 1231, 1239-1240 (9th Cir. 1981); *Dente* v. *Riddell, Inc.*, 664 F.2d 1 (1st Cir. 1981); *United States* v. *Poludniak*, 657 F.2d 948 (8th Cir. 1981), *cert. denied*, 454 U.S. 1064 (1982).

[7] *United States* v. *McRae*, 593 F.2d 700, 707 (5th Cir.), *cert. denied*, 444 U.S. 862 (1979).

> the proffered evidence. Thus, the appellate court need not find that the trial judge abused his discretion; it is enough that he erred in concluding that he had any discretion.[8]

The D.C. Circuit's opinion in no way recognizes what the other circuits and commentators readily acknowledge: the requirement that before a judge has any discretion to exclude relevant evidence, the judge must first find that the danger of confusion substantially outweighs the probative value. Nor does the opinion acknowledge the presumption against the exclusion of relevant evidence. Instead the Court asserts simply that the issue is one within the judge's discretion and ignores the fact that the trial court's discretion to exclude relevant evidence is much more narrow than its discretion to admit relevant evidence.

This case poses for this Court an important issue: does Rule 403 give the trial judge broad discretion to exclude relevant evidence, reviewable by the Court of Appeals only on an abuse of discretion standard, or does the rule limit the trial judge's authority and grant discretion to exclude only if the judge first makes the determination, which is reviewable, that the probative value of the evidence is substantially outweighed by a countervail-

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[8] 22 C. Wright & K. Graham, note 3 *supra*, at 309-310. Another commentator has written:

> Since the rule requires that the probative value of the challenged evidence be "substantially outweighed" by the danger of [one of the countervailing considerations], the rule favors admissibility of relevant evidence. A slight danger that admission will cause [a countervailing consideration] is to be ignored. 10 J. Moore, *Moore's Federal Practice* IV-69 (1982).

See *United States* v. *Authement*, 607 F.2d 1129 (5th Cir. 1979), which concerned the admissibility of hospital photographs of a beating victim. "If any such danger [that a jury verdict based on an emotional reaction to the photographs] was present, it certainly did not *substantially* outweigh the probative value of the photographs." *Id.* at 1131.

ing factor. The D.C. Circuit takes the former approach. All the other circuits which have ruled on the issue take the latter. This Court should clarify what the proper standards are.

C. The D.C. Circuit's Decision Conflicts with the Rule in Other Circuits as to the Appropriateness of a Trial Judge's Considering Issues of Credibility in the Application of Rule 403

It is clear beyond doubt that the trial judge did not apply the conscious balancing test mandated by the Rules prior to excluding the evidence at issue. In fact, she did nothing more than declare that the proffered evidence was "terribly confusing." [9] She then excluded the chart, refused to allow petitioner Boyd to testify to specific occasions when he had underbilled, and excluded the dollar amount of the underbillings. The Court of Appeals analyzed the trial judge's ruling to be a determination that the claimed underbillings would not withstand factual analysis, that they were, in fact, incredible, relying upon a "hodge-podge collection of personal memory, unauthorized evidence, surmise and *post hoc* contract interpretation." 740 F.2d at 53.[10]

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[9] The trial court's finding that the evidence was "confusing" without detailing her reasons was inconsistent with the general practice followed by most courts in applying Rule 403. The general practice has been to focus on whether the evidence would confuse or mislead the jury by causing it to concentrate on collateral matters, which would be irrelevant or prejudicial. *See United States* v. *Zarra*, 298 F.Supp. 1074, 1084 (N.D. Pa.), *cert. denied*, 400 U.S. 826 (1969); *Seven Provinces Insurance Co.* v. *Commerce and Industry Co.*, 65 F.R.D. 674, 689 (W.D. Mo. 1975); *United States* v. *Dennis*, 525 F.2d 782, 797 (8th Cir. 1980); *United States* v. *Bowe*, 360 F.2d 1, 15 (2d Cir. 1966). The trial court offered no adequate explanation for its finding, and the Court of Appeals was silent with respect to this inadequacy, choosing instead to "interpret" the judge's ruling to be that the proffered evidence lacked sufficient credibility.

[10] Petitioners were given no opportunity at trial to refute these challenges to the credibility of the proffered evidence. Since the

The D.C. Circuit's opinion conflicts directly with the established law in other circuits; Rule 403 does not permit a trial judge to exclude evidence on the ground that it is incredible. Issues of credibility are left to the jury. As the Fifth Circuit has written:

> [C]ase law precedent and constitutional precepts forbid judicial interference with the jury's duty to resolve credibility issues. . . . Rule 403 does not permit exclusion of evidence because the judge does not find it credible.

United States v. *Thompson*, 615 F.2d 329, 332-33 (5th Cir. 1980).[11]

If left to stand, the D.C. Circuit's decision in this case will not only be inconsistent with the rule in other circuits with respect to the standards to be applied when interpreting Rule 403, but it will also allow trial judges in the District of Columbia to exclude relevant evidence under Rule 403 because the judge has determined that the evidence lacks credibility. Not only does this allow the judge to invade the province of the jury, it is directly inconsistent with the holding of the Fifth Circuit in *United States* v. *Thompson*, *supra*.

D. The Application of Rule 403 to Exculpatory Evidence is an Important Issue Which No Court has Considered

When appellate courts have confronted the application of Rule 403 in criminal cases, the issues have almost exclusively concerned the admissibility of inculpatory evidence offered by the prosecution and challenged by the defense as being unduly prejudicial. *See, e.g., United States* v. *Dennis*, 625 F.2d 782, 797 (8th Cir. 1980).

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evidence was excluded, the prosecution made no attempt to rebut it, and petitioners, of course, had no opportunity to reply to any rebuttal.

[11] *See also United States* v. *Hans*, 684 F.2d 343, 346 (6th Cir. 1982); *United States* v. *Bates*, 468 F.2d 1252 (5th Cir. 1972); *Stevens* v. *United States*, 306 F.2d 834 (5th Cir. 1962).

And it has been in this context that appellate courts other than the D.C. Circuit have developed standards of review which favor admissibility and which limit the trial court's authority to exclude relevant evidence. The obvious rationale underlying these rulings has been the bias of the Federal Rules of Evidence towards the admission of all relevant evidence and the basic principle that the finder of fact should be confronted with all the relevant facts.

When the evidence in question is exculpatory instead of inculpatory, another set of complementing principles comes into play. The basic principles of the American criminal justice system are the presumption of innocence and the requirement that the government prove beyond a reasonable doubt that a defendant is guilty. In the face of those principles, Rule 403 must be interpreted very narrowly before it can be applied to exclude evidence which tends to disprove a defendant's guilt. Indeed, outside of circumstances in which evidence is repetitive or of only marginal relevance, it is doubtful that Rule 403 should ever be applied to exclude exculpatory evidence.

Rule 403 permits a judge to *admit* evidence even if the judge has first determined that the probative value of the evidence is substantially outweighed by a competing interest.[12] The rule says that once the judge has struck the balance substantially against probative value, he *may* exclude the evidence. In light of the principles discussed above, the limited discretion of a trial judge to exclude relevant evidence under Rule 403 is even more circumscribed when the evidence is exculpatory.

The opinion of the Court of Appeals is silent with respect to the exculpatory nature of the excluded evi-

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[12] *See* 22 *Wright & Graham*, note 3, *supra*, at 264-65. Rule 403 does not permit a judge to exclude evidence unless he determines that probative value is substantially outweighed.

dence. The opinions in other circuits are equally silent because the evidence in question has not been exculpatory. This case presents this Court with an important issue—an issue ignored by the D.C. Circuit: how should Rule 403 be applied when the challenged evidence is exculpatory? If the D.C. Circuit opinion should stand, at least in that circuit the law will be that a trial judge has virtually unreviewable discretion to exclude relevant, exculpatory evidence under Rule 403. This Court should avail itself of the opportunity to interpret the application of Rule 403 in the context of exculpatory evidence.

CONCLUSION

For the reasons stated above, petitioners respectfully request that the petition for writ of certiorari be granted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

CR No. 83-00021

No. 83-2024

UNITED STATES OF AMERICA

v.

NORTH AMERICAN REPORTING, INC.
And Consolidated Case Nos. 83-2025 and 84-5710

Before: TAMM, WALD and SCALIA, *Circuit Judges*

[Filed July 3, 1985]

ORDER

Upon consideration of appellants' petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 83-2024, 83-2025

UNITED STATES OF AMERICA

v.

NORTH AMERICAN REPORTING, INC.,
Appellant.

UNITED STATES OF AMERICA

v.

RICHARD LEE BOYD,
Appellant.

Argued May 30, 1984

Decided July 27, 1984

Appeals from the United States District Court
for the District of Columbia (Criminal No. 83-00021)

Hamilton P. Fox, III, Washington, D.C., for appellants.

Harriet J. McFaul, Atty. Dept. of Justice, Washington, D.C., with whom Joseph E. diGenova, U.S. Atty., Washington, D.C., was on the brief for appellee. Michael W. Farrell, Asst. U.S. Atty., Washington, D.C., also entered an appearance for appellee.

Before TAMM, WALD and SCALIA, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

In this case, North American Reporting, Inc. and Richard Lee Boyd appeal convictions on eight counts of mail fraud, in violation of 18 U.S.C. § 1341, and eight counts of making false statements, in violation of 18 U.S.C. § 1001. Appellants press two central claims.[1]

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[1] Appellants have also urged this court to find that the district court abused its discretion in refusing to allow certain questions during the cross-examinations of two prosecution witnesses, FBI Special Agent Coy and White House Press Office liaison Virginia Kim Hoggard. We decline to do so.

First, during agent Coy's testimony regarding the government's summary chart, appellants sought to ask him: "Prior to the preparation of the chart, did you discuss how you were going to present this information with the prosecutor in the case?" Tr. 618. The district judge disallowed the question, ruling that the appellants "aren't entitled to bring out the combination [sic] of talking to the district attorney. It doesn't have anything to do with [the relevant subject matter]. We assume that he talked to [the prosecutor]." Tr. 620.

The defense maintained that the question was necessary to show that the chart reflected "the government's point of view." *See* Tr. 618-19. However, we believe that it would be obvious to the jury that Coy was presenting the government's position in the case. After all, he was introduced as a government agent who had been involved in the investigation of North American, *see* Tr. 563-64, and the purpose of his testimony was to summarize the government's evidence. We therefore believe that the jury had sufficient information to appraise the bias and motives of the witness without the appellants' proposed cross-examination, and accordingly hold that the district court acted within its discretion in disallowing the line of inquiry. *See, e.g., United States v. DeLuca*, 692 F.2d 1277, 1282 (9th Cir. 1982); *United States v. Hughes*, 658 F.2d 317, 321 (5th Cir. 1981), *cert. denied*, 455 U.S. 922, 102 S.Ct. 1280, 71 L.Ed.2d 463 (1982); *United States v. Singh*, 628 F.2d 758, 763 (2d Cir.), *cert. denied*, 449 U.S. 1034, 101 S.Ct. 609, 66 L.Ed.2d 496 (1980).

Second, appellants sought to question Coy regarding the similarity between the times noted on North American's sign-in sheets, known as the "wall sheets," and the times represented by Boyd to the government in the vouchers. This line of questioning was designed to show how Boyd had not intentionally misrepresented time on his vouchers, but rather had relied on the wall sheets instead of the employees' time sheets. *See* Tr. 646. Agent Coy had not used these wall sheets in the preparation of the summary charts. More-

First, they contend that the district judge improperly excluded from evidence a summary chart proffered by the defense. Second, they find error in the government's failure to produce, and the district court's failure to examine, notes taken by the prosecutor during interviews with various prosecution witnesses. Appellants argue that these notes must be produced under the Jencks Act. *See* 18 U.S.C. § 3500.

We find that the district judge acted well within her discretion in excluding the summary chart from evidence on the ground that it was "confusing." However, we remand this case because the district judge failed to meet her obligation to make an adequate determination that the prosecutor's notes are not in fact producible under the Jencks Act. Pending resolution of the Jencks Act issue, the appellants' conviction shall not be vacated.

I. BACKGROUND

North American Reporting, Inc. (North American) is a corporation that provides stenographical services. Richard Lee Boyd is the president of North American. From November 1, 1979 to October 31, 1981, North American provided court reporting services to the White House under two year-long contracts.

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over, the wall sheets had not been authenticated by the employees who signed in, while the time sheets had been so authenticated. We therefore believe the district judge properly prevented this line of inquiry during the cross-examination of agent Coy. The defense remained free to introduce the wall sheets into evidence, provided the proper foundation could be established, and to bring out Boyd's reliance on the wall sheets when Boyd himself took the stand.

Third, appellants sought to question White House Press Office liaison Virginia Kim Hoggard about her refusal to meet the defense counsel prior to trial. *See* Tr. 275-76. Since this line of questioning was of such limited relevance, and since appellants were allowed to ask other questions regarding bias, *see* Tr. 274, we affirm the district judge's decision to disallow the question.

Under these contracts, North American was paid on the basis of the number of hours worked by its employees. The company submitted vouchers to the government every month listing the hours worked during the previous month, and breaking down the hours to show the time worked by each individual employee on each particular day. The government then paid North American in accordance with the hours represented on the vouchers.

North American's employees were also paid by the hour. Each employee would submit a time sheet to the company twice a month, and would receive compensation on the basis of the hours noted on the time sheet.

The prosecution alleged that Boyd, through the company, deliberately submitted false vouchers that overstated the hours worked by the company's employees. To prove the deliberate overbillings, the prosecution presented numerous former employees who authenticated their time sheets. A summary witness, Federal Bureau of Investigation (FBI) Special Agent Richard D. Coy, then presented a summary chart that compared the hours submitted by Boyd on the vouchers. Coy testified that he had found 38.5% of the voucher entries he examined to be in excess of the hours represented on the employees' time sheets. He also identified 3.6% of the entries as *under* stating the number of hours represented on the time sheets. To aid Coy's summary testimony, the prosecution entered into evidence a chart that listed the relevant entries from the vouchers and from the time sheets, and calculated the differences between the two for each particular employee.[2]

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[2] The prosecution also presented a courier, who testified that he had not performed some of the work for which Boyd had billed the government. *See* Tr. 502-06. Similarly, the prosecution presented a private accountant who testified that he had not performed three evenings of overtime for which Boyd had billed the government.

Moreover, the government put on testimony to show Boyd's guilty knowledge and intent. For example, one witness testified about a

To counter the prosecution's case, the defense argued that "any discrepancies between the employee time sheets and the vouchers resulted from legitimate rounding off of hours, different contractual interpretations by the employees and North American Reporting as to what hours could be billed, and honest mistakes." Appellants' Brief at 7 (citations omitted). To support this theory, Boyd testified that, instead of referring to employees' time sheets to prepare the vouchers, he relied upon various sources, including his own memory, the President's schedule, typed transcripts, and employee sign-in sheets (so-called "wall sheets"), in order to reconstruct the time worked by his employees and himself.

To aid Boyd's testimony, the defense attempted to introduce into evidence a chart purporting to summarize, in the same manner as the prosecution's summary chart, numerous instances in which Boyd contends he *under* billed the hours actually worked in his vouchers submitted to the government. After objection by the prosecution, however, the district court excluded the chart on the grounds that it was "terribly confusing" and "absolutely baffling to the court [and] . . . to the jury." Tr. 996, 998-99.

At the conclusion of a seven day trial, the jury convicted appellants on all counts. The district judge subsequently sentenced Boyd to concurrent sentences of two years' imprisonment on the odd-numbered counts and concurrent sentences of three years' probation on the even-

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telephone conversation in which Boyd instructed him to bill for an employee who was not working that day. According to this testimony, Boyd responded to resistance by saying, "Well, they won't remember at the end of the month anyway." Tr. 520-22. Other testimony indicated that Boyd had purposely billed under a government contract at a page rate higher than the contract rate on his assumption that "the person who was approving the invoice was not the same person who executed the contract and they'd probably never know." Tr. 530.

numbered counts provided that Boyd made restitution of $13,260. This appeal ensued.

II. The Exclusion of Defendants' Exhibit No. 24

During Richard Boyd's testimony, the defense attempted to introduce Defendants' Exhibit No. 24 into evidence. This exhibit purported to be a calendar of the defendants' *under* billings, and was designed to counter the prosecution's case as to deliberate overbillings by Boyd. Designed with a format similar to the government's summary chart, *see supra* at 51-52, the defendants' exhibit listed, day by day, the hours Boyd claimed to have underbilled the government.

However, unlike the prosecution's summary chart—which relied primarily upon the authenticated time sheets of employees—the defendants' exhibit relied upon a hodgepodge collection of personal memory, unauthorized evidence, surmise and *post hoc* contract interpretation. For example, seventeen entries on the defendant's exhibit relied entirely on Boyd's undocumented assertion that he was working on a given day, but did not bill for the time worked. Boyd testified that he assumed he worked on some of those days because he and Carol DeHaven, who married Boyd in September 1981, were "inseparable," and since Ms. DeHaven was working on those days, he "would have been there" also. Tr. 1009. In another entry, Boyd listed overtime for three employees because a fourth employee worked ovrtime that day, and Boyd "presumed [that the other three were] in also." Defendants' Exhibit No. 24, *reprinted in* Appellants' Appendix (A.A.) at 44 (March 10 entry). However, the authenticated time sheet for at least one of those employees shows that the employee worked a normal eight hours that day. *See* Government Exhibit No. 34. Moreover, the voucher submitted by Boyd for that day shows a normal workday for *all* four employees. *See* Government Exhibit No. 6.

Moreover, a vast number of the entries in the defendants' chart rely upon a highly questionable interpretation of North American's White House contract. At trial, Boyd maintained that he would have been entitled to bill the government for overtime, in addition to the regular contract amount for a workday, whenever an employee began work before 10 a.m. or left work after 7. p.m., *regardless of whether the total hours worked by the employee exceeded the nine hour period specified in the contract.* While none of the government administrators who testified at trial supported this interpretation, and Boyd himself failed to submit vouchers that adhere to this interpretation, the defendants' chart employed this interpretation in order to create the preponderance of the supposed underbillings.[3]

For these, and additional[4] reasons, we believe that the district judge had ample basis for excluding the defendants' chart on the ground that it was confusing. Evidence may be excluded, although it is relevant if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. The decision to exclude relevant evidence pursuant to Rule 403 is committed to the sound discretion of the trial judge. *See, e.g., United States v. Lemire*, 720 F.2d 1327, 1348 (D.C. Cir. 1983),

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[3] By contrast, the relevant contract term provided that North American would perform services "during an 8-hour period *normally* between the hours of 10:00 AM and 7:00 PM, Monday through Sunday. *The 8-hour period may, upon sufficient notice (i.e., prior to release from duty the previous evening) fluctuate to any 8-hour block.*" Government Exhibit No. 1, at 22 (emphasis added); *see also* Government Exhibit No. 2, at 22 (statement of work).

[4] For example, Boyd's "underbilling" for employees on one date relies on the wall sheet for the relevant time period was not offered into evidence, and the employees implicated in the "underbilling" had not affirmed the wall sheet entry at trial. Accordingly, Boyd's "summary" chart in fact contained information not properly in evidence.

cert. denied, —— U.S. ——, 104 S.Ct. 2678, 81 L.Ed.2d 874 (1984); *United States v. Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973). Defendants' Exhibit No. 24 presents a frequently observed danger associated with summary charts: the jury might "treat the summary as additional evidence or as corroborative of the truth of the underlying testimony." *Lemire*, 720 F.2d at 1348; *see United States v. Scales*, 594 F.2d 558, 564 (6th Cir.), *cert. denied*, 441 U.S. 946, 99 S.Ct. 2168, 60 L.Ed.2d 1049 (1979). When, as here, the "evidence" summarized derives from such diverse sources, of various shades of unreliability, including mere surmise, undocumented recollection and questionable assumptions, we do not think the district judge abused her discretion in preventing the exhibit from influencing the jury.

Finally, we note that the district judge permitted Boyd to testify as to the matters presented by the chart. The defense therefore was not deprived of the opportunity to make its case regarding its underbilling theory.[5] By ex-

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[5] Appellants also complain that the district judge abused her discretion by preventing Boyd from testifying about "the specific occasions when the 'undercharges' occurred" and "the dollar amount of the [total alleged] 'undercharges.'" Appellants' Brief at 21. We reject this contention.

It is often noted that a trial court enjoys broad discretion to reduce "undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403; *see Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). In this case, the prolonged enumeration of the numerous instances in which Boyd claimed he had "undercharged" would have created such undue delay. Boyd's testimony regarding the actual dollar amount of the total alleged undercharges would have had no probative value as to whether his overbilling had been intentional. Since Boyd's testimony regarding the underbillings was offered only to prove his lack of guilty knowledge and intent, *see* Tr. 995-97, we believe that the judge did not commit reversible error by preventing testimony regarding the total alleged undercharges. As the trial judge explained, "I don't really think it's material how much money he thinks he has undercharged them." Tr. 1014.

cluding the defendants' exhibit, the district judge simply assured that the jury would not be confused by the chart which, on its face, appeared to summarize facts, but which, in actuality, collected the results of the jumble of the defendants' wishes, guesses and undocumented recollections. Accordingly, we find no error in the district judge's decision to exclude the chart from evidence.

III. The Jencks Act Determination

Before trial, the defense requested that the prosecution produce certain notes taken during interviews with witnesses. The defense maintained that the Jencks Act, 18 U.S.C. § 3500, required the production of such notes. Without examining the contents of the prosecutor's notes,[6] the district judge ruled that the notes were "work products" of the government attorneys, and were not producible under the Jencks Act. Tr. 24; *see* Tr. 25-30.

Appellants ask this court to rule that the prosecutor's notes were in fact producible under the Jencks Act. Further, appellants, citing 18 U.S.C. § 3500(d), contend that because Jencks Act materials were not produced, the testimony of the witnesses with whom the prosecutor conducted the relevant interviews, several of whom were key witnesses for the prosecution, should be stricken from the trial record. Accordingly, appellants conclude, this court should rule that the failure to produce the prosecutor's notes was reversible error.

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[6] The appellants also requested production of notes taken by FBI agents during witness interviews. After examining these notes, the district judge ordered the production of five sets of notes taken under oath. *See* Tr. 27. These notes were evidently "adopted or approved" by the witnesses. *See* 18 U.S.C. § 3500(e)(1). As to the remaining sets of FBI notes, the district judge determined that they "sounded as though it was the reporter, not the person," *i.e.*, the witness, whose thoughts were reflected in the notes. *Id.* Thus, the district court made a reasonable determination that the remaining FBI notes were not "substantially verbatim." *See* 18 U.S.C. § 3500(e)(2).

While we find that the district judge failed to discharge her duty to inquire into whether the notes were producible under the Jencks Act, we decline at this stage of the proceedings to hold that this failure constitutes reversible error. Instead, we remand this case for a redetermination of the Jencks Act issue. Pending such a redetermination, the appellants' convictions remain intact.

We note, to begin with, that the district judge ruled against the Jencks Act request on an erroneous legal ground. Without examining the prosecutor's notes, the district judge determined that they were "work products," and accordingly held that they were not producible under the Jencks Act. However, the Supreme Court has held unequivocally that the work product doctrine does not bar the production of the notes of government attorneys that are otherwise producible under the Jencks Act. *See Goldberg v. United States*, 425 U.S. 94, 105-08, 96 S.Ct. 1338, 1345-47, 47 L.Ed.2d 603 (1976).

Moreover, established precedent requires the district court to engage in an adequate inquiry into the nature of the documents before ruling against Jencks Act production. As the Supreme Court has explained:

> a Government objection to production may require that the trial court inspect documents or hold a hearing to gather extrinsic evidence bearing on the extent to which the documents are statements producible under § 3500. In *Campbell I* [*Campbell v. United States*, 365 U.S. 85, 81 S.Ct. 421, 5 L.Ed.2d 428 (1961)] the Court unanimously concluded that the trial judge was obliged to conduct some inquiry into the circumstances of the witness' interview there in question. The circumstances of this case compel the same conclusion. [The defendant's] testimony raised a sufficient question under the Act to require the trial judge to conduct such an inquiry, and since we hold that the trial judge erred in exempting the material

> from production as attorneys' "work product," a remand for such an inquiry by the District Court is required. . . .

Goldberg, 425 U.S. at 108-09, 96 S.Ct. at 1347 (citations and footnotes omitted). Furthermore, this court has held that a district judge "has an affirmative duty to determine whether any [Jencks Act] statement exists and is in the possession of the Government and, if so, to order the production of the statement." *Saunders v. United States*, 316 F.2d 346, 349 (D.C. Cir. 1963); *see also Hilliard v. United States*, 317 F.2d 150 (D.C. Cir. 1963). The district court's inquiry "may involve the interrogation of the witness or of the government agent, or an in camera examination of what is purported to be a statement under the statute." *Saunders*, 316 F.2d at 349. The district judge in this case entirely failed to make a reasonable inquiry into whether the prosecutor's notes should be produced under the Jencks Act.[7]

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[7] The government in its brief maintains that it was the defense's obligation to establish that the prosecutor's notes constitute Jencks Act "statements." *See* Appellee's Brief at 42-43. In so arguing, the government relies upon Justice Powell's concurrence in the *Goldberg* case.

In that concurrence, Justice Powell, joined by the Chief Justice, took issue with the majority's ruling that the trial judge was *required* to make further inquiry into the nature of the documents in issue. Instead, he found the witness' "cursory and ambiguous testimony" to be "wholly insufficient to require the judge to interrupt the trial and conduct a collateral inquiry." 425 U.S. at 120, 96 S.Ct. at 1352 (Powell, J., concurring). Building upon this concurrence, some circuits have now ruled that in order to give rise to a judicial responsibility to make an inquiry, the defendant must "first meet the burden of specifying with reasonable particularity (normally by his cross-examination at trial) that a certain document exists, that there is a reason to believe that the document is a statutory 'statement,' and that the Government failed to provide it in violation of the [Jencks] Act." *United States v. Robinson*, 585 F.2d 274, 280-81 (7th Cir. 1978) (en banc), *cert. denied*, 441

Nor do we believe it is proper for this court to make the Jencks Act determination in this appeal. As a general rule, the initial determination of whether the documents constitute producible "statement" under the statute should be made in the district court. *See Goldberg*, 425 U.S. at 108, 96 S.Ct. at 1347 ("The Court of Appeals erred in undertaking to make the initial determination

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U.S. 947, 99 S.Ct. 2171, 60 L.Ed.2d 1051 (1979); *see United States v. Gaston*, 608 F.2d 607, 611 (5th Cir. 1979).

However, we choose not to follow these other circuits for two reasons. First, Justice Powell's concurrence runs counter to the principles espoused by the opinion of the Court in *Goldberg*, and agrees only in the result. *Accordingly*, to follow the principles expressed in the concurrence would defy the contrary pronouncements of the majority holding. Moreover, Justice Powell's concurrence also runs counter to the law of this circuit, as set forth in the *Saunders* opinion. Hence, our ruling today adheres to the law both of this circuit and of the Supreme Court.

Finally, we note that even under Justice Powell's concurrence, this case should be remanded. Even though he believed that typically the trial judge has no affirmative duty to inquire into the documents in the absence of a reasonably particular showing of cause, Justice Powell concurred in the remand because the trial judge:

> did not deny the [Jencks Act] motion because of the insufficient foundational showing. Rather, he ruled that the "work product" privilege protected the prosecutor's notes. [The defendant's] counsel may not have sought to supplement his foundational showing because he had been led reasonably to believe that he had carried the burden of showing the necessity of an inquiry, and that the judge's denial was based solely on a mistaken view as to the "work product" privilege. For this reason, I concur in the judgment to remand.

425 U.S. at 129, 96 S.Ct. at 1356 (Powell, J., concurring). In this case before us today, the district judge made precisely the same ruling, holding that the work product doctrine barred production of the prosecutor's notes. Accordingly, the appellants "may not have sought to supplement their foundational showing" because of the broad bar established by the trial judge's ruling. Thus, remand of this case would be proper even under the reasoning of Justice Powell's concurrence.

whether the materials constituted producible 'statements.' "); *id.* at 109 n.15, 96 S.Ct. at 1347 n.15 (examination of the documents "is initially a task for the District Judge"). Accordingly, we remand for the district court to make the Jencks Act determination.

In doing so, the district court should consider whether the prosecutor's notes qualify as "statements" under either section 3500(e)(1) or section 3500(e)(2) of title 18. If the notes qualify as "statements" under either subsection, they must be produced. Under section 3500(e)(1), the notes constitute the statements of witnesses if they have been "adopted or approved" by those witnesses. While prior to trial the prosecutor maintained her "very, very firm position that [the notes] . . . have not been adopted by the witnesses," Tr. 24, the *Jencks* determination is to be made by the court, not the prosecutor. *See, e.g., Campbell v. United States*, 365 U.S. 85, 92-93, 81 S.Ct. 421, 425, 5 L.Ed.2d 428 (1961); *United States v. Harrison*, 524 F.2d 421, 428 (D.C. Cir. 1975); *see also Palmero v. United States*, 360 U.S. 343, 361, 79 S.Ct. 1217, 1229, 3 L.Ed.2d 1287 (1959) (Brennan, J., concurring). Thus the trial court must "determine whether the prosecutor's notes were actually read back to [the witness] and whether he adopted or approved them." *Goldberg*, 425 U.S. at 110, 96 S.Ct. at 1348. Under section 3500(e)(2), the notes constitute statutory "statements" if they are a "substantially verbatim" account of the witness interview. Notes that "evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes" do not meet this standard. On the other hand, this standard does not require that the notes reflect a "delusive exactness." *See Palmero v. United States*, 360 U.S. 343, 352-53, 79 S.Ct. 1217, 1224-25, 3 L.Ed.2d 1287 (1959). So long as the notes can be fairly characterized as the witness' own words, they should be made available to the defense. *Id.* at 352, 79 S.Ct. at 1224.

We do not vacate the appellants' convictions pending resolution of the Jencks Act issue. If the district court, after adequate examination of the issues, determines that the notes do not constitute Jencks Act "statements," it should supplement the record with findings and enter a new final judgment of conviction. However, if the district court finds that any of the notes should have been produced pursuant to the Jencks Act, and that the error was not harmless,[8] the judgment of conviction should be vacated and a new trial should be conducted. *See, e.g., Goldberg*, 425 U.S. at 111-12, 96 S.Ct. at 1348-49; *United States v. Del Toro Soto*, 676 F.2d 13, 17 (1st Cir. 1982); *United States v. Peters*, 625 F.2d 366, 371 (10th Cir. 1980); *United States v. Conroy*, 589 F.2d 1258, 1273 (5th Cir.), *cert. denied*, 444 U.S. 831, 100 S.Ct. 60, 62 L.Ed.2d 40 (1979).

IV. Conclusion

The case is remanded to the district court for a prompt redetermination of whether the prosecutor's notes should be produced pursuant to the Jencks Act. Finding no other errors upon appeal, we do not vacate the judgment of convictions pending the resolution of the Jencks Act issue.

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[8] Courts cannot "speculate whether [Jencks material] could have been utilized effectively" at trial. *Clancy v. United States*, 365 U.S. 312, 316, 81 S.Ct. 645, 648, 5 L.Ed.2d 574 (1961). The harmless error doctrine must therefore be strictly applied in Jencks Act cases. *See, e.g., Goldberg*, 425 U.S. at 111 n.21, 96 S.Ct. at 1348 n.21; *Campbell v. United States*, 373 U.S. 487, 497 n.14, 83 S.Ct. 1356, 1362 n.14, 10 L.E.2d 501 (1963).

APPENDIX C

* * * *

[12] MR. FOX: May this be marked, please?

DEPUTY CLERK: Defendants' Exhibit No. 24 marked for identification.

(Defendants' Exhibit No. 24 was marked for identification.)

BY MR. FOX:

Q Showing you what has been marked as Defendants' Exhibit No. 24 for identification, I ask you if you recognize that document.

A Yes, I do.

Q Can you tell us what that document is?

A It's a calendar for the second contract year that lists undercharges for that time period.

MR. BEIZER: May we approach the bench, Your Honor?

THE COURT: Yes.

(Conference at the bench.)

MR. BEIZER: May we have a proffer as to the intended use of such a document?

[13] MR. FOX: The intended use of the document is similar. He will testify, but I hope briefly, as Agent Coy testified concerning overcharges.

The purpose for that is, number one, the government itself has noted undercharges in their document. I want to try and demonstrate, therefore, —and the government so noted this.

Number two, to the extent the government argues this guy was using every opportunity to overbill the White House, I want to demonstrate that there are a number of opportunities where he actually could have billed the White House legitimately and he didn't bill them, he underbilled them.

It seems to me it goes directly to the issue of intent.

MR. BEIZER: I'm not sure whether Your Honor has previously ruled on this, so I beg the court's indulgence.

It seems to me that this is a document prepared long after the issues which we are now disputing in court arose.

My primary objection to it is that Mr. Boyd, when he was asked specifically with respect to Miss Beattie—but I presume that his answer would be consistent with that—when it was said, "Why didn't you bill Miss Beattie for the hours between 8 and 10, since she arrived every morning at 8, [14] maybe 8:15," and he said, "I was not trying to overbill the government," in response to that specific question.

THE COURT: Miss Beattie testified, however, that she didn't work on their business until 10 a.m.

MR. BEIZER: My point, in response of Miss Beattie, I think it's further evidence, if any is needed, that what Mr. Boyd is attempting to do here is to litigate his civil claim, if any.

For Mr. Fox to presume, as he did in the explanation to Your Honor when I asked for a proffer, that these are legitimate billings, is a matter of some substantial dispute at this moment.

What was clear is what Mr. Boyd did bill. That's on the bill. That's in evidence, and there's been a lot of testimony about that.

What he did in retrospect, may have decided was available to him to bill, it seems to me is irrelevant as to what his intent was at the time that he did actually do these billings.

So the fact that he made errors in his favor or in the government's favor—pardon me, in the government's favor, as was testified to by Agent Coy, those specific examples were based on the employees' time records and what he put down.

There were occasions where I think the numbers were 18 out of 275 or out of 183 example.

[15] What this document appears to be is an attempt to go back through. It would appear to be very recently done, certainly not as of the time of the billings. We know what he did on the billings.

And he is saying, "Gee, if my records indicate that the employee—not what the employee put down—I don't think that is part of his testimony—put down she was there from 9 to 6 and I only billed that as a manday, under a theory the government said we weren't to charge, doesn't mean we don't dispute it; it's that we are not going to charge it as part of the criminal case; that he should be allowed to come in and say, "Mine could have been billed as overtime. I didn't do it. It could have been billed as overtime," and I fail to see—

One, I think it's confusing, and the court has authority, under Rule 403, to cast aside evidence that is of limited probative value as to his intent at the time of taking and can only lead for—

THE COURT: Why don't we hear from the other side?

MR. FOX: Your Honor, it seems to me that if the government is going to say this man deliberately went out and overbilled that we ought to be able to show examples where they are not all mistakes, a lot of examples where he deliberately did not bill people.

For example, on a number of occasions he knows [16] he was in and can explain why he knows he was in on particular days and he didn't bill his time at the White House.

THE COURT: What does this do with the charges that he has?

MR. FOX: It seems to me it relates directly to intent. And also relates directly to our defense that a number of these things were simply errors on his part.

Their theory is the man is venal and attempting to get every dollar he can out of the contract.

THE COURT: I don't think that is what he is charged with.

MR. FOX: Surely that is the underlying theory where he overbilled. Surely he is not at the same time going to pass up legitimate opportunities to bill time under the same contract.

MR. BEIZER: I suppose insofar as this chart goes to expalin that, Mr. Boyd can testify, "I was in the White House at 9:30, but I didn't bill that half hour of overtime, I only billed from 10."

THE COURT: My recollection was he said, in the first place, he never was—

MR. BEIZER: Whatever, Your Honor. I can't recall his testimony on that point.

Be that as it may, then, he would be testifying as to his personal knowledge, as of that time, and I think [17] that that would be appropriate.

My objection goes to the chart includes not only Mr. Boyd but others. You will notice that none of the charges dealt with Mr. Boyd, because we didn't have his time record or, indeed, the benefit of his testimony as to what hours he was in or out.

THE COURT: Or De Haven.

MR. BEIZER: Or De Haven, that' right.

MR. FOX: They did, however, have the benefit of Miss De Haven's testimony.

MR. BEIZER: We did, Your Honor. She was immunized and testified.

THE COURT: The jury hasn't.

MR. BEIZER: In other words, what I am trying to say is if he knows that Miss Lavery was in at 9 o'clock, 9 to 6, and only was in a manday, the point of the fact is he billed her just as a manday.

Now, to come back and say, "Oh, my intent at that time was—I was mistaken at that time. I could have billed her," seems to beg the question, to give it a post hoc rationalization for what he could have done, based on his interpretation of the contract.

None of those hours—to give that post hoc rationalization as to what his intent was.

Whereas, if he says himself, "I know I was in at [18] 9:30 and I only billed a manday. I could have done it

that way, different, but I didn't," I suppose that that would be relevant as to his intent.

It would have been a time that he could have billed that he underbilled.

MR. FOX: Intent always have to be proved after the fact. You never go back as we instruct the jury, and scrutinize the—I have forgotten the language.

THE COURT: I think this is terribly confusing and I will exclude it.

MR. FOX: On the grounds it's confusing?

THE COURT: It has Mr. Boyd's time down here all through the whole thing. We have never had Mr. Boyd's time or the benefit of it, because he's never presented us anything with his time schedules.

MR. FOX: So the court—so I can understand the ruling, I cannot elicit testimony concerning the occasion—

THE COURT: We have nothing before this jury that has anything to do with De Haven. We don't have a single document or time schedule.

MR. FOX: I just want to make sure I understand the court's ruling. The court is saying I cannot bring out testimony of those occasions during the contract year when Mr. Boyd underbilled the government on this contract, to counter the argument of intent?

[19] I just want to make sure.

THE COURT: You can ask him if he remembers these things. What does he have to go on?

The only thing that has been presented are the time schedules of the other people. They haven't charged him with overbilling for himself.

MR. FOX: That's not my point. My point is that if—it certainly seems to me it goes to show his intent.

I'm not saying the chart proves anything. Because intent—if a man is deliberately not billing himself for times he knows he's in, I think a jury is entitled to consider that in considering whether he had intent to defraud.

And on other occasions the government says the time records don't match.

Of course our position is he never relied on the employees' timesheets.

THE COURT: What is he relying on? That's what the court really wanted to know and I really didn't want to get into the case.

MR. FOX: I will bring it out again, but what he says is he relied upon his wall sheets, to some extent, transcripts he had which is starting and stopping times, President's schedule which was annotated.

THE COURT: The difficulty is with the transcripts, with the starting and finishing times, it doesn't show who [20] did the transcripts, who was working on them.

MR. FOX: As he testified a moment ago, the issue there is sort of academic as far as he's concerned, as long as somebody did it.

THE COURT: It's academic as long as somebody did it, but you don't charge six people for doing one transcript.

MR. FOX: It depends on the transcript, the way these people worked.

THE COURT: The best evidence is their own time schedules for which they got paid.

MR. FOX: Well, I dispute that, because he didn't use those. That's his clear testimony.

THE COURT: You don't dispute that he didn't use them.

MR. FOX: He tried to go to the White House, Your Honor, to get the annotated President's schedule to try to compare those and they don't exist any more.

They've got the formal ones written out, but they would apparently incorporate a lot of different things as the days changed.

Those don't exist. We went through a bunch of them, subpoenaed them. The only way I could show this kind of thing is through his testimony.

THE COURT: The concern of the court is this: Not only is this something that is absolutely baffling to the [21] court, I feel reasonably sure it would be baffling to the jury.

MR. FOX: He will, of course, testify to explain it.

THE COURT: Yes. And how much time?

MR. FOX: I hope—

THE COURT: You did tell me he was going to be finished before lunch and it is now 14 minutes before 12.

MR. FOX: I didn't anticipate being here for 20 minutes. A lot of the information is the same, so that after he gives the explanation one time, I can refer him to the different days and he can say that is the explanation, and we can do it in shorthand form.

MISS MC FAUL: I'd like to draw the court's attention to August, for example, where he is now going to come in and say that he is entitled to bill Miss Beattie for the 8:15 to 10 slot.

He just testified she wasn't working on White House things and he wasn't trying to bill the government before. Now he comes in post-indictment, in the middle of the trial, and says he is entitled to do this to revert back to his intent when he did the original bills.

Mr. Fox suggested, on Friday, that he was not going to attempt to introduce the evidence of an offset claim. It is, "If we owe you money, this is how much you owe me."

THE COURT: It is confusing to the court. I am [22] going to exclude it.

If you want to ask him whether or not there's some days he didn't bill and he made mistakes, that's fine.

MR. FOX: Without putting the document in evidence and have him go through and point out each individual instance?

THE COURT: No.

MR. FOX: I may ask him the general question?

THE COURT: Yes. I think it ought to be crystal clear to the jury when he indicates that he did not charge

for a lot of his services that he isn't being charged with that in a single count of the indictment.

MR. FOX: Your Honor, one other point. The way the indictment is written, it says the bottom line figure for each month is inflated.

It seems to me that this goes directly to that issue, because if I charged you $50 for Mr. Beizer's time and forgot to charge you $50 for my time, and the bills comes out to be the same—

THE COURT: I believe I also give them an instruction that the exact amount is not a part—

MR. FOX: That's not my point. I'm not sure even the government's—you know, the government's proof can establish it is inflated, even assuming it's true, at least if you take this into consideration. If, in fact, he undercharged something.

[23] THE COURT: Since we don't have his figures at all for either Mr. Boyd or Miss De Haven before this jury, how can they possibly decide whether it was inflated or not?

MR. FOX: We have testimony, Your Honor. He will testify about it.

THE COURT: But it doesn't have anything to do with what he is charged with.

MR. FOX: It does, indeed, Your Honor. It counts—I forget—one through eight or nine through sixteen, May to March 1981, state that he inflated the voucher, that the false statement with that said—whatever the figure was—and this shows he considerably understated things, it may not be a false statement.

THE COURT: He considers it now. He didn't consider it at the time.

MR. FOX: No, he deliberately, at the time, decided not to bill certain things, and he will testify to that. He didn't write it down at the time.

THE COURT: Why don't you just ask him those questions that's all right if you want to go into that, by all means do so.

This, I think, is too confusing.

MR. FOX. I would have him explain.

THE COURT: I am sure you will. The court has ruled.

[24] MR. FOX: All right.

(End of bench conference.)

MR. FOX: Your Honor, may the witness consult the document in his testimony—in the course of his testimony?

THE COURT: When did he prepare the document?

MR. FOX: I instend—I intend to bring all that out.

THE COURT: All right.

BY MR. FOX

Q Mr. Boyd, the document that you have in front of you, when did you prepare that—or who prepared it, first of all?

A I prepared it. And in its final form—I prepared it last night. I started last week, made it a document of undercharges once and then went back, checked it and found some errors and redid it last night.

Q Can you tell us what materials you used to prepare the document?

A I used the monthly invoices.

Q You need the monthly invoices you filed with the White House?

A Yes.

THE COURT: As against what?

THE WITNESS: Against itself. I combined it with my own knowledge of the contract and my own recollection [25] of my practices at the time, which recollection is refreshed by looking at the monthly invoices.

THE COURT: I don't think you should use the document.

MR. FOX: All right.

BY MR. FOX:

Q Mr. Boyd, without using the document, were there ever any occasions during—

THE COURT: Don't lead.

BY MR. FOX:

Q Mr. Boyd, on approximately how many occasions, during the contract year, were there undercharges by your company to the White House?

A Several hundred.

Q Can you tell us what some of those undercharges were?

A Some of them—

THE COURT: First of all, what were they about?

THE WITNESS: What were they about?

THE COURT: Yes. How did they happen to be undercharges?

THE WITNESS: A variety of things. Mathematical errors would be the simplest kind. There are a number of those.

There are just errors in transposing information from the more detailed part of the contract to the summary [26] sheet.

There are times when the overtime was billed wrong and those were undercharges.

And there were times when people were left off, myself in particular when I recall being in. When there were light days, we had to staff up for maximum and I recall very clearly that I would leave myself off if—even though I was there, if the day ended up being light.

I may be forgetting some of the reasons.

THE COURT: Mr. Boyd, you are not charged for that. That is not included in this indictment.

MR. FOX: Your Honor, may we approach the bench?

THE COURT: Yes.

(Conference at the bench.)

MR. FOX: I'm sorry to object, but I do object to that question, because the indictment doesn't charge anybody's time.

It doesn't mention any of the employees in the indictment. The indictment only has a bottom line figure and what the indictment says is that a figure was inaccurate and as a result of that—that's a false statement and that as a result of that inaccuracy checks were mailed and it doesn't mention any employee's name.

THE COURT: Is it in the bills of particulars?

MR. FOX: In the bill of particulars it's not there. [27] But certainly—

I think it's prejudicial to say that he's not charged—that his time isn't charged in the indictment.

And it's not even charged in the bill of particulars, because it still goes to the question of intent and whether the government's figure is in fact inflated the way they say it is.

MR. BEIZER: What I am concerned about, in his answer to Mr. Fox's question, he talked about the overtime hours as being improperly billed.

I presume that that answer, if it's developed, would go to the question of contract interpretation, which he says, by his own testimony at least, in the preparation of this chart—perhaps he had this view some time other than the time he submitted the document, but we have had no foundation that he adhered to that view and had that view at the time he was submitting the documents, at the time the checks were being mailed in furtherance of the scheme.

There's been no foundation for that.

Now what we are getting into, Your Honor, by the answer, the overtime hours were underbilled and he used contract interpretation and compared the document against the document, in answer to the court's question; that what we are getting into is his post hoc rationalization for his conduct.

[28] I don't believe that that is relevant to the issue of intent in this case. I think that getting again into these explanations, again, is needlessly confusing and its probative value to the issue of his intent at the time is minimal.

Under those grounds, I'd ask that it be excluded again.

MR. FOX: Your Honor, there is a foundation. Mr. Boyd testified, in the early portion of his direct examination, that he took the view that he was entitled to bill hours before 10 or after 7 as overtime hours, but that he didn't always do it consistently which, again, goes, I think, to his intent.

But there is foundation.

The COURT: My recollection is—is it those hours—no, it was the lunch hours that they did not count.

MR. FOX: That's correct. They didn't count those hours either.

Well, they did in some instances and didn't in some others. That came out in Mr. Coy's question.

In the question of April Beattie, I think they didn't and in some others they did.

MISS MC FAUL: We didn't count April Beattie. My recollection is we didn't count them for anybody.

MR. FOX: You did, otherwise the totals at the [29] bottom of your chart don't add up. And Coy testified to that.

MISS MC FAUL: My recollection differs, Mr. Fox.

MR. BEIZER: But, be that as it may, it seems to me, again—my objection was not to—my objection was to the use of the chart originally, as Your Honor recalls.

The reason why it seemed to include hours of people on a theory that under a contract interpretation you could bill these times of 8 to 10 as overtime, where he didn't do it.

And that theory, it seems to me, has come about, one, to litigate a civil case or to prosecute a civil claim on

behalf of Mr. Boyd and, two, has come about rather late in the day.

It appears there's been no foundation as to when he came about it, but the evidence speaks for itself and I haven't heard any testimony to the contrary.

Maybe it could be cleared up by a question from Mr. Fox as to whether or not at the time he was making out the invoices what was his intent at the time, did he intend to take into account the hours of overtime between —did he ever do so?

And if he didn't, why didn't he? Maybe that's the way to get around this conundrum.

My objection is not to Mr. Boyd or Miss De Haven. [30] Miss De Haven is a special problem all unto herself.

But Mr. Boyd can testify, "Yes, on this day I was in at 9:30." It's up to us to cross-examine to find out how he bases his recollection, I presume, and, "I didn't bill the government," period.

But when he starts going into Miss De Haven, unless he can say Miss De Haven was in at 9:30 that day or Miss Lavery, "I remember that she was there, but I only billed her to 10—"

MR. FOX: He's going to show the voucher showed she was in at 9:30 that day. Based on his voucher and the theory he was operating under, which he testified to on direct examination, he could have billed her from 9:30 and only billed her from 10.

THE COURT: Let's let him say it. Let's get to it.

(End of bench conference.)

BY MR. FOX:

Q Mr. Boyd, you indicated that there were certain occasions when you did not bill yourself?

A Yes.

Q Can you tell us approximately how many of those occasions there were, without looking at the document?

A Just in this time period that I was confident with, 10-15.

Q Why wouldn't you bill yourself—first of all, [31] how do you remember those days in which you were in and didn't bill yourself?

A A couple of reasons. One is that this time Carol De Haven and I were inseparable. We went everywhere together, came into work together and left together.

On those days she was in, with very few exceptions, I would have been there. Virtually no exceptions. And vice-versa. If I was there, she was also there.

Reading the documents, there are days I can see that's the way it's listed. I also remember I was in. I was extremely interested in this contract and in what went on there.

It was exciting and so as much as I could be—which was every work day—I was there.

Q Why did you not then on some occasions, bill your time to the White House when you were, in fact, working at the White House?

A Because I was trying to be conservative and I was conscious of the restraints on—the budgetary constraints and at the end of the month if I saw that there was a light day or a couple of light days, and we had four people in, even though I might just say, "Well, I'll bill for three," and it would have been, in general, my name that I would have left off.

But, say, looking ahead, my responsibilty was [32] to have as many people there to cover it regardless of what happened. And so I would staff up to a kind of a medium level, not even the peak, to cover a peak day, but to cover a medium day. If we had a light day, we had more people than we needed.

Q Now, Mr. Boyd, were there—what, if any, occasions were you there in which you neglected to bill all the overtime that you could have?

A Well, I listed some a moment ago and there were some others. There were times that Agent Coy found, in comparing with the timesheets, and I think there were probably many more.

If I could look through all the timesheets, I think it would take a long time, but I think I would find many more.

Q But just based on what you did look at, the vouchers, how were you able to make a determination, if you did, that there were occasions when you didn't bill overtime that you could have billed?

A Well, if it was before 10 or after 7 p.m. I should have billed it as overtime and I didn't always. And, additionally, there were times I just made math errors that didn't bill as many hours as we had listed.

And then there were other times where I didn't bill the day at all the people apparently billed me on the timesheets for the day, but I missed—just didn't list [33] it at all on my invoice.

Five or six people were in sometimes with several hours of overtime just missing from the invoice.

Q Now, when you made these calculations, Mr. Boyd, what, if anything, did you do about claims for lunches that were missed and you billed as overtime?

A Well, even though it's clear to me that we did have to work and we should be paid for those lunch times, I didn't include that when I was trying to find undercharges.

I just figured those were easy to set aside as one category, so I didn't include them in my list.

Q When you were looking for the undercharges what, if anything, did you do with respect to weekend hours which you thought should have been billed as overtime, but they would only let you charge mandays?

A That was another issue that I decided to set aside, even though I feel we were owed something for that.

I set that aside and didn't include it on my list of undercharges either.

Q And what, if anything, did you do concerning additional standby time on trips when your employees weren't working, but were waiting around to work?

A Even though I had invoiced for some of that time on my—but didn't bill for necessarily all of that, I felt I could have.

[34] I also decided to set that aside and I didn't include that on my list.

Q Mr. Boyd, you testified that you consulted the vouchers in preparing the undercharges.

Were there any other sources of information which might assist you in determining whether there were undercharges?

A Yes. I could have gone back and done the whole process, using all the documents I used, month by month, to try to reconstruct it. I could have even taken considerably more time than I did the first time and tried to really find every error, every undercharge and so on.

I made some effort to do that and was given permission to look at documents they still keep on file at the White House. There were some documents that they didn't have that I didn't have access to.

The President's schedule day by day, with handwritten notes that Kim Hoggard would have kept as far as additional events, for some reason those were no longer available. No one could find them.

There were also transcripts that—the files of transcripts that we could look through that we would have kept month by month, and the White House keeps those also, but in looking through those I found that there were transcripts that weren't there that should have been in their file copies.

Q How were you able to determine there were transcrips [35] that were missing.

A Because I looked through, trying to find if there was a complete set of transcripts that they had kept, and I would look at my invoice and see ones that were listed here with beginning and ending times and I would look in their records—they are kept in chronological order and there are just a number of them that weren't there.

And there were certain types of transcripts, photo opportunity transcripts, that I didn't find any of.

Q What, if any, available did you have to use of the worksheets or wall sheets?

A I only had the ones that—just a few that are here. Most of them weren't kept, because they were just scratch sheets. So those weren't available either.

Q In compiling your list of undercharges, Mr. Boyd, did you reach a figure as to the amount of undercharges during the contract, using the method that you did?

M. BEIZER: Objection, Your Honor.

THE COURT: Sustained.

MR. FOX: The question is whether he reached a figure.

THE COURT: The question was he was telling you what it was.

MR. FOX: But the objection is sustained to that question?

[36] THE COURT: It is.

MR. FOX: I think I am finished, Your Honor.

If I could just approach the bench briefly?

THE COURT: Yes.

(Conference at the bench.)

MR. FOX: This is what I was going to conclude with. I don't quite understand.

I thought I was going to be allowed to have him testify about this matter without going through the chart.

Agent Coy was able to testify as to what he thought the figure was. I don't understand why Mr. Boyd is not being allowed to testify in that fashion.

THE COURT: I don't really think it's material how much money he thinks he has undercharged them. Do you?

You said it would go to the different counts, but since it didn't—

Mr. FOX: Your Honor, I am not being able to break it down month by month. I can't do it without the chart.

You know, the government hasn't broken it down month by month. They have given us a figure.

THE COURT: That's right.

MR. FOX: It seems to me if the overcharged figures are there, it should also have the undercharges.

MR. BEIZER: Again, Your Honor, we have the fact that it appears a great bulk of these go on Mr. Boyd's post hoc contract interpretation, which may have allowed him or may not have.

That claim has not been resolved. And even if it were resolved in his favor, it would be, in our view, immaterial: his contract interpretation.

It is his testimony that a number of his recalculations were based not on his own recollection of whether he was there or not, whether he put them on there.

We did hear that explanation with respect to that part of this: that he was there, but it was a light day and he excluded his own name from the bill. That's his testimony.

We have to live with that. Whether we can or not, on cross-examination, remains to be seen.

But when he gets into this contract interpretation issue, again, it appears to me not to go to the issue of his intent.

And when his total figure—whether it's done on a month-by-month basis or whether it is done overall—is allowed into evidence here, I think we are well past the line of relevance and confusion.

I'd object and ask that—

MISS MC FAUL: It looks like an offset claim and that's not a defense to these charges.

THE COURT: All right.

MR. FOX: Again, the charges—

[38] THE COURT: Some of these things, I believe now he said he made the conscious thought to not charge them when he was there, because he didn't want to overdo it or something.

But the other things that he is thinking of now and that he could have charged, he realizes now are not really defense to it, because he didn't have the idea at that time.

MR. FOX: But, Your Honor, he did testify—

THE COURT: Now he has testified that he made mistakes and it is in there for that purpose, whatever it is.

MR. FOX: That's consistent.

THE COURT: Right.

MR. FOX: But, Your Honor, he has already testified, on direct examination, that his theory was he could have charged anything under the contract.

He testified to this: he could have charged overtime for anything outside the 10 to 7.

The fact he didn't do that is not consistent with our defense that it is inconsistent, but it is consistent with a person not deliberately looking to get every single dime he could get out of this contract.

I think I am entitled to present that evidence.

MISS MC FAUL: I would like it clear for the record that it is not our theory that he was trying to get every single dime out of this contract.

[39] Our theory is that he got more than dimes: a few dollars out of the contract by intent to defraud, by falsely representing the times of the people that were there.

What Mr. Fox uses as his argument to characterize as every dime is another thing. But, in the same context, if we are going to get into every dime out of the contract, but every dime under the contract but not out of the contract is not what this case is about.

It's not what has been charged in the indictment and I fail to see, again, how it goes to intent when he comes up after the fact and says, "Gee, I could have," or "I did do it here, but I didn't do it there."

MR. FOX: Because the government is coming up after the fact and saying he charged—

THE COURT: They hardly would have been able to do it after the fact.

MR. FOX: He didn't either. He didn't know they were going to bring these charges.

THE COURT: Counsel, we are just wasting time. The court ruled way back when he was on the stand.

(End of bench conference.)

MR. FOX: I have no further questions of this witness.

* * * *